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No. 99-1343

Supreme Court, U.S.
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In The

Supreme Court of the United States

RICHARD C. MOENNING,

Petitioner,

v.

ILLINOIS COMMERCE COMMISSION and COMMONWEALTH EDISON,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Illinois

PETITIONER'S REPLY MEMORANDUM

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6 pp

PETITIONER'S REPLY MEMORANDUM

Each respondent claims the Supreme Court ought to deny petitioner the fundamental fairness provided by Illinois statute and guaranteed by the Equal Protection Clause of the Fourteenth Amendment. (The Public Utility Act, 220 ILCS 5/10-101, incorporating The Illinois Administrative Procedure Act, 5 ILCS 100/1-1 and in particular the requirement of a "contested case"). Two reasons are advanced by each that upon scrutiny demonstrate respondents' proclivity toward " . . . intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." The Equal Protection clause of the Fourteenth Amendment stands to secure fundamental fairness for every person.[1]

A. Respondent Commonwealth Edison's Opposition To Certiorari

Respondent Commonwealth Edison's principal claim is that there is an independent and adequate state law basis that bars this Court from entering an appropriate order (28 U.S.C. § 2106) that petitioner seeks. (Pet. 9-10). The state law basis alleged is the Illinois Appellate Court's order dismissing petitioner's appeal after it previously and expressly authorized the appeal to proceed. (Pet. App. 12).

Adams v. Robertson, 520 U.S. 83 (1997) cited by respondent Commonwealth Edison when applied to the facts here provides no reason not to grant certiorari, vacate, and

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[1] Fundamental fairness protects even petitioner who as a lawyer is better able than most consumers to challenge respondent Commonwealth Edison's irrational and wholly arbitrary behavior for the good of all other consumers. Likewise, the public's interest in due process is surely greater than the interest of respondent Illinois Commerce Commission to argue claims not in the record it failed to make of evidence it refused to hear. See *Village of Willowbrook v. Olech*, U.S. Supreme Court Docket No. 98-1288, February 23, 2000.

remand as petitioner requests. (Pet. 11). Petitioner not only met his burden of showing the due process issue was properly presented to respondent Illinois Commerce Commission (the decision the Court is asked to review) the record demonstrates petitioner repeatedly sought any reason for Appellate Court changing its position after authorizing the appeal. (Pet. App. 15-18). Petitioner has satisfied the Adams' requirement, (*Adams*, at pp. 86-87).

Also respondent Commonwealth Edison claims petitioner did not properly perfect his appeal so there is no final judgment that could be the basis for this Court's 28 U.S.C. § 1257 jurisdiction. Respondent Commonwealth Edison's argument is plainly wrong since the record shows petitioner's Motion For Leave To Appeal was expressly authorized *as timely*. (Pet. App. 12). In the event respondent Commonwealth Edison continues to assert the Appeal was not timely, the computation follows: 35 days from Nov. 20 is Dec. 25 (26) and 30 days from Dec. 26 is Jan. 25; the Motion was filed Jan. 20, 1999.

A GVR order is appropriate since this Court cannot be certain given the Appellate Court's express authorization of petitioner's appeal (Pet. App. 12) why respondent Commonwealth Edison relies upon a notice of appeal (Resp. App. 20, 24) that the appellate court clerk did not docket even after the Notice of Appeal was filed. *Id.* Regardless, petitioner did timely perfect an appeal. (Resp. App. 26). Respondent Commonwealth Edison's argument relying upon a Notice of Appeal that was never docketed and on which the Appellate Court did not rely when it expressly authorized the appeal to proceed is disingenuous, and is not persuasive.

Respondent Commonwealth Edison advances a third reason in opposition. The reason is there is no denial of due process by respondent Illinois Commerce Commission since there are no issues discussed by petitioner to suggest any violation of due process or that substantial due process issues exist that warrant review by this Court. Petitioner cites the want of hearing and the respondent Illinois Commerce Commission's arbitrary and capricious action

beyond its grant of legislative authority as violations of petitioner's right to constitutional due process. (Pet. App. 8.)[2]

Respondent Commonwealth Edison's citation of *Puerto Rico Aqueduct & Sewer Authority v. United States Environmental Protection Agency* (Brief 13-14) is misplaced. Congress gave the EPA power of summary disposition; the Illinois legislature never authorized the Illinois Commerce Commission such power.

In reply, it is well settled petitioner has the right to invoke this Court's jurisdiction where no judicial review of administrative action can be obtained. (Pet. 4-6).

B. Respondent Illinois Commerce Commission's Opposition

Respondent Illinois Commerce Commission's opposition seeks to deflect attention from question presented by petitioner to whether this Court has jurisdiction to review the decision of the Illinois Appellate Court dismissing petitioner's appeal " . . . as untimely. . . . " This claim complements the opposition of respondent Illinois Commerce Commission's regulated private utility.

As noted above, the Illinois Appellate Court never dismissed petitioner's appeal as untimely; it expressly authorized petitioner's appeal *as timely*. For what reason or reasons not disclosed by this record, the Appellate Court changed its position on respondent Commonwealth Edison's Motion To Dismiss Appeal (Respondent Commonwealth Edison, App. 30), denying petitioner's constitutional right to judicial review. The Illinois Commerce

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[2] Respondent Commonwealth Edison's reliance upon earlier disputes with petitioner outside the record and respondent Illinois Commerce Commission's reliance upon matters outside the record to summarily dispose of the case without a hearing where no summary authority exists demonstrates "intentional and arbitrary discrimination", a plain violation of the Fourteenth Amendment. *Id.*

Commission argues in opposition petitioner's Motion For Leave to Appeal was untimely. (Resp. 9). The Illinois Appellate Court never made that finding and never vacated its order that expressly authorized the appeal. (Pet. App. 12). It is the uncertainty of the basis of the Appellate Court's dismissal that renders a GVR order appropriate as petitioner requests. (Pet. 10-11). *Lawrence v. Chater*, 516 U.S. 163, 116 S.Ct. 604, 133 L.Ed. 2d 545 (1996).

Respondent Illinois Commerce Commission opposes the grant of certiorari in this case claiming the Fourteenth Amendment does not impose a constitutional requirement to hold an evidentiary hearing upon every complaint. Nonetheless, the Illinois Public Utility Act, 220 ILCS 5/10-101 incorporating the Illinois Procedure Act requires such hearings. The statute calls for evidentiary hearings and allows the Commission to adopt reasonable and proper rules and regulations *relative to the exercise of its powers.* There is no power given the commission such as Congress has given the FDA (*Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609 (1973) or the EPA (*Puerto Rico Aqueduct & Sewer Authority v. United States Environmental Protection Agency*, 35 F.3d 600 (1st Cir. 1994), *cert. den.*, 513 U.S. 1148, 115 S.Ct. 1096 (1995). Citation of *Chesterfield-Medora v. ICC*, 37 Ill. 2d 324, 328 (1968) likewise grants no summary administrative authority. There the Illinois Supreme Court noted a hearing was not required where personal jurisdiction was lacking. Nowhere has the Illinois legislature ever granted the Illinois Commerce Commission power to act as a court of law. (Pet. 5). Finally, the respondent's citation of *Bloom Twp. High Sch. v. ICC*, 722 N.E.2d 676, 687 (Ill. App. 1st Dist 1999) (Resp. 11) is noteworthy for its parenthetical (assuming Commission had authority to grant summary disposition of complaints.) The Commission's argument in opposition is just that; an assumption of authority that the legislature has never granted. For this reason, as well, citation of its Rules (Resp. 10) calls attention to the fact there is no specific grant of summary administrative authority which must precede the making of rules.

In reply, respondent Illinois Commerce Commission's opposition depends upon the fact the Illinois legislature has given it summary administrative authority. Yet respondent points to no legislative authority. The Illinois Supreme Court has admonished respondent stating it is different from a court and has no authority to make decisions except as authorized by legislation. (Pet. 5). Respondent's failure to point to its grant of authority demonstrates its absence and its violation of petitioner's right to due process of law. (Pet. 6).

Since respondent Commonwealth Edison fails to explain the Illinois Appellate Court's express authorization of petitioner's appeal and both respondents rely solely upon Commonwealth Edison's claim that certiorari is barred since no judicial review ought to be allowed where a petitioner fails to perfect a Notice of Appeal procedure – even though here petitioner proceeded upon a Motion For Leave to Appeal – the opposition becomes the inability of each respondent to face the issues presented by the petition; whether the Fourteenth Amendment requires state administrative agencies to exercise only the power granted by the legislature and to recognize that the summary dismissal of complaints in the absence of such power is arbitrary, capricious, and in violation of the federal constitution. Whereas here respondent Commonwealth Edison and respondent Illinois Commerce Commission consider petitioner's prior disputes outside the record as a reason to deny petitioner a hearing, such treatment ought to be considered irrational and wholly arbitrary. Summary reversal is appropriate and now in order.

Respectfully submitted,

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